ENG MEE YONG & ORS. v. V. LETCHUMANAN

[P.C. (Lord Diplock, Lord Morris of Borth-y-Gest, Lord Hailsham of Saint Marylebone, Lord Edmund Davies and Lord Fraser of Tulleybelton) February 14 and April 4, 1979]

[Privy Council Appeal No. 25 of 1977]

Land Law — Caveat — Contract for sale of land — Termination of contract for non-payment of balance of purchase price — Purchaser entering caveat against land — Application to remove caveat — Principle to be applied — Balance of convenience — Whether there is serious question to be tried — Discretion of trial judge — Whether appellate court can interfere with such discretion — National Land Code, ss. 326 and 327.

Contract — Contract for sale of land — Whether time of essence of contract — Failure to complete — Forfeiture of deposit — Whether oral evidence admissible to contradict terms of written agreement — Evidence Act, 1950, ss. 91 and 92.

Evidence — Contract in writing — Whether oral evidence admissible to contradict term of written agreement — Evidence Act, 1950, ss. 91 and 92.

Practice and Procedure — Appeal — Discretion exercised by trial judge — Whether appellate court can interfere.

The appellants in this case were the registered proprietors of a piece of land in Seremban and they had agreed to sell it to the respondent. Subsequently the appellants terminated the contract as the respondent had not paid the balance of the purchase price. The appellants then applied for the removal of the caveat which had been entered against the land by the respondent. The respondent in his affidavit alleged that there had been an agreement for extension of time for completion but this was denied by the appellants. The learned trial judge accepted the sworn denial of the appellants in their affidavit that they had agreed to any extension of time and he rejected the allegations of the respondent as insufficient to disclose that there was any serious question to be tried as to whether any agreement for the sale of the land by the appellant to the respondent was still subsisting at the date of the hearing of the application. The learned trial judge therefore granted the application of the appellants and ordered the removal of the caveat. On appeal to the Federal Court, the appeal was allowed (see [1977] 1 M.L.J. 7). The Federal Court held that whether or not the agreement had been lawfully terminated could only be decided in the action which the respondent could and had in fact brought in relation to the agreement for sale and therefore the respondent had a caveatable interest in the land. The appellant appealed to the Privy Council.

Held, allowing the appeal: (1) in this case the onus was on the respondent, as caveator, to satisfy the court that on the evidence presented to it his claim to an interest in the property did raise a serious question to be tried and having done so, he must go on to show that on the balance of convenience it would be better to maintain the status quo until the trial of the action by preventing the caveatee from disposing of his land to some third party;

(2) in this case the trial judge had rejected the allegations in the respondent's affidavit as insufficient to disclose that there was any serious question to be tried as to whether any agreement for sale of the land by the appellants to the respondent was still subsisting at the time of the application. The learned judge accepted the sworn denial of the appellant in his affidavit that they had ever agreed to any extension of time beyond the agreed date for completion;

(3) it was for the learned judge to determine whether the statements in the affidavits that were relied upon as raising a conflict of evidence upon a relevant fact have sufficient plausibility to merit further investigation as to their truth. An appellate court ought not to interfere with the judge's exercise of his discretion under section 327 of the National Land Code unless the way in which he exercised it is shown to have been manifestly wrong;

(4) in this case the learned trial judge's evaluation of the affidavit evidence was justified and there was no ground for an appellate court to interfere with the way in which his discretion was exercised.

Per **Lord Diplock:** "Unless there were some speedy procedure open to the registered proprietor to get the caveat set aside in cases where the caveator's claim is baseless or frivolous or vexatious, the Torrens system of land registration and conveyancing, so far from giving certainty to title to land in Malaya, would leave the registered proprietor in a more precarious position as respects his powers of disposition of his land than an unregistered proprietor under English Law."

Cases referred to:-

(1) *Nanyang Development (1966) Sdn. Bhd.* v. *How Swee Poh* [1970] 1 M.L.J. 145.

(2) *American Cyanamid* v. *Ethicon Ltd.* [1975] A.C. 396.

(3) *Kasivisvanathan Chettiar* v. *Pereira* [1976] 2 M.L.J. 110.

HIGH COURT.

Ng Seng Kiok for the applicants.

N. Ramachandran for the respondent.

Ajaib Singh J.: This was an application for an order that a private caveat entered by the respondent against land belonging to the applicants under Grant No. 2457 Lot 593 in the Mukim of Ampangan be forthwith removed on the ground that the respondent had no interest in the land after he had failed to complete the purchase of the said land under an agreement for sale dated June 28, 1974. The applicants also claimed damages for loss suffered by them as a result of the wrongful lodgment of the caveat and the failure on the part of the respondent to withdraw it after September 28, 1974 which was the date for the completion of the sale of the land.

The application was by originating motion supported by a joint affidavit of the applicants dated August 7, 1975. In their affidavit the applicants stated that they were co-owners of the land and they had entered into a written agreement with the respondent on June 28, 1974 whereby the respondent was to purchase the land at the price of $827,656.25. Time was stated to be the essence of the contract and the agreement provided that the purchase should be completed on or before September 28, 1974. The respondent however failed to complete the purchase of the land by that date in accordance with the written agreement whereupon the applicants forfeited the sum of $97,765.62 which was paid by the respondent as a deposit and in part payment of the purchase price. The applicants also forfeited a further sum of $30,000 which was paid by the respondent to the applicants towards the purchase price pursuant to a clause in the agreement. On November 9, 1974 the applicants were served with a notice by the Registrar of Titles under section 324(3) of the National Land Code stating that a private caveat expressed to bind their land had been entered on the application of the respondent. On January 6, 1975 the applicants applied to the Registrar for the removal of the caveat under section 326(1) of the Code but the Registrar's notice of intended removal of the caveat could not be served upon the respondent as the respondent had moved to another place. The notice could not also be served by registered post and the envelope containing the notice was returned undelivered to the Registrar by the Postal Department with the remark that it was unclaimed. Hence the present application by the applicants for the removal of the caveat under section 327(1) of the National Land Code. In their

joint affidavit the applicants referred to a letter dated October 25, 1974 addressed to the applicants' previous solicitors by the then solicitors of the respondent wherein it was stated *inter alia* that the applicants and the respondent had orally agreed to an extension of two months beyond September 28, 1974 for the completion of the purchase of the land and that the respondent would complete the purchase on or before the agreed extended date of November 28, 1974. The applicants in their affidavit denied that they had ever agreed to the extension of two months beyond September 28, 1974 for the completion of the purchase or to any extension at all. In any event they said that the respondent made no attempt to complete the purchase at any time.

When the notice of motion came up for hearing before me I noticed that it was not served upon the respondent but was made *ex parte*. I did not think it proper in the circumstances of this case to make any order on the application in the absence of the respondent and I directed that the notice of motion be served upon him which was eventually done by way of substituted service. The respondent then filed a lengthy affidavit in reply but not everything that was stated therein was relevant or worthy of consideration. In his affidavit the respondent stated that the agreement for sale dated June 28, 1974 was not the final or the first written agreement concerning the land and he referred to an earlier agreement dated December 16, 1973 a copy of which was exhibited in the affidavit. The respondent stated that this earlier agreement was not specifically cancelled or withdrawn by any subsequent agreement in writing and further that the second agreement dated June 28, 1974 did not contain all the agreed terms because some of the terms were made orally which included the term that time should not be the essence of the contract. He further stated that the applicants had agreed to grant an extension of time for a period of two months from September 28, 1974 and he said that the agreement of June 28, 1974 had not been expressly terminated. He stated further that the applicants were not entitled to forfeit the two sums of $97,765.62 and $30,000. He had enhanced the value of the land by building an access road with the knowledge and consent of the applicants and they were therefore estopped from denying his interest in the said land. He said he was obliged to lodge the caveat as the applicants were about to disregard the actual terms of the agreement and forfeit to their own use the sums of money paid by him notwithstanding the fact that the building of the approach road on the land was then still in progress. The respondent stated further that on October 10, 1975 he lodged a second caveat against the same land setting out his grounds more fully for claiming an interest in the land. He had also caused a writ to be issued against the applicants for an order that they do complete the sale of the land and for a declaration that they were not entitled to forfeit the sum of $127,765.62.

After giving due consideration to the application, the affidavits and the submissions advanced on behalf of the parties I came to the conclusion that the respondent had no caveatable interest in the land concerned within the meaning of section 323(1) of the National Land Code. The parties had entered into a written agreement on June 28, 1974 wherein time was made the essence of the contract and acting pursuant to the provisions in the agreement the applicants were well within their rights when they forfeited the deposit of $97,765.62 and the further sum of $30,000 upon the failure of the respondent to complete the purchase of the land on or before September 28, 1974. The respondent stated in his affidavit that the first agreement dated December 16, 1973 was not specifically cancelled or withdrawn by any subsequent agreement in writing. This statement was patently false because in one of the recitals in the second agreement of June 28, 1974 it was specifically stated that the vendors and the purchaser had mutually agreed to determine the former agreement of December 16, 1973. The respondent also said in his affidavit that there was an oral term agreed to by the parties that time should not be the essence of the contract and that it was also agreed that the time for the completion of the purchase be extended by two months. Here too there was no merit in the respondent's allegations. The vendors and the purchaser signed the agreement of June 28, 1974 in the presence of solicitors and the agreement itself appeared to have been drawn by a firm of solicitors. It was a well prepared document and it stated in no uncertain terms that time should be the essence of the contract. The respondent's attempt to introduce extrinsic parol evidence to vary the terms of the written agreement of June 28, 1974 was obviously meant to embarrass the applicants and to cause delay in the proceedings. Moreover this evidence was inadmissible under sections 91 and 92 of the Evidence Act, 1950 for apart from the bare allegations of the respondent no other evidence in support was adduced so as to bring the matter under any of the provisos to section 92 of the Evidence Act. On the other hand I accepted the statement of the applicants in their joint affidavit that they had not agreed to any extension of time for the completion of the purchase of the land and that the respondent had made no attempt whatsoever to complete the purchase at any time. In the event I held that the applicants were entitled to an order in terms of the first prayer in the originating motion and I ordered that the caveat entered by the respondent be removed. The applicants had also claimed damages for loss suffered by them as a result of the wrongful lodgment of the caveat. This claim however was not pursued by the applicants and no evidence was adduced on their behalf to establish the extent of any damage or loss suffered by them. With regard to the second caveat entered against the same land by the respondent on October 10, 1975 Mr. Ramachandran for the respondent gave an undertaking after briefly consulting his client in court that in the event that no appeal against my decision ordering the removal of the caveat was filed within ten days of my order the respondent would withdraw the second caveat.

Costs of the proceedings were ordered to be paid by the respondent to the applicants.

From the above judgment the respondent appealed to the Federal Court, which allowed the appeal — see [1977] 1 M.L.J. 7. *The appellants appealed from the judgment of the Federal Court.*

PRIVY COUNCIL APPEAL FROM MALAYSIA.

C. Bathurst Q.C. for the appellants.

Jules Sher (*N. Ramachandran* with him) for the respondents.

Cur. Adv. Vult.

Lord Diplock (delivering the judgment of the Board): This is an appeal from a judgment of the Federal Court of Malaysia in proceedings brought in the High Court in Malaya at Seremban under section 327(1) of the National Land Code, and claiming the removal of a private caveat which had been entered on the register document of title to land under section 322 of the Code.

The applicants in the High Court ("the caveatees") were the registered proprietors of the land which is situated in the Ampangan District of Seremban. The respondent in the High Court ("the caveator") was the person at whose instance a caveat was entered on the register document of title to the land, on November 9, 1974. The caveat was expressed to bind the land itself to the extent of a whole share. The caveatees had applied to the Registrar on January 6, 1975 for removal of the caveat under section 326(1) of the Code; but the Registrar was unable to serve notice of intended removal on the caveator as he could not be found. The caveatees were thus driven to proceed *ex parte* under section 327(1) for an order for the removal of the caveat. This they did on August 26, 1975: their application was supported by a joint affidavit of the caveatees. The case came on for hearing before Ajaib Singh J. in the High Court on November 10, 1975. Shortly before that, the caveator had appeared and on November 4 had filed an affidavit in which he asserted a right to the title in the land under a contract of sale made between him and the caveatees. Shortly before the date of his affidavit he had issued a writ claiming specific performance of this contract.

The learned judge granted the caveatees' application and ordered the removal of the caveat. He gave his reasons for judgment on February 5, 1976. The caveator appealed to the Federal Court on a number of grounds to which their Lordships will have to advert later. The appeal was heard on September 7, 1976. It was allowed, and the order for removal of the caveat set aside. From this judgment and order of the Federal Court appeal is now brought to His Majesty the Yang di-Pertuan Agong.

Although the facts of the instant case are peculiar to itself the appeal raises a question of law of more general importance as to the principles applicable to the exercise by the High Court of its jurisdiction under sections 326 and 327 of the National Land Code. Their Lordships will deal with this general question first before turning to the consequence of applying those principles to the facts of the instant case.

The Torrens system of land registration and conveyancing, as applied in Malaya by the National Land Code, has as one of its principal objects to give certainty to title to land and registrable interests in land. Since the instant case is concerned with title to the land itself their Lordships will confine their remarks to this, though similar principles apply to other registrable interests. By section 340 the title of any person to land of which he is registered as proprietor is indefeasible except in cases of fraud, forgery or illegality, and even in such cases a *bona fide* purchaser for value can safely deal with the registered proprietor and will acquire from him an indefeasible registered title.

The system of private caveats is substituted for the equitable doctrine of notice in English land law. By section 322(2) the effect of entry of a caveat expressed to bind the land itself is to prevent any registered disposition of the land except with the caveator's consent until the caveat is removed. This is a very grave curtailment of the rights of the proprietor, yet it can be imposed at the instance of anyone who makes a claim to title to the land, however baseless that claim may turn out to be. By section 324 the Registrar is required to act in an administrative capacity only; he is not concerned with the validity of the claim on which the caveat purports to be based. If the document is in the correct form he must enter the caveat on the register and leave the registered proprietor to secure its removal and to claim compensation from the caveator for any damage he has suffered by reason of the entry of the caveat having been obtained by the caveator without reasonable cause.

The caveat under the Torrens system has often been likened to a statutory injunction of an interlocutory nature restraining the caveatee from dealing with the land pending the determination by the court of the caveator's claim to title to the land, in an ordinary action brought by the caveator against the caveatee for that purpose. Their Lordships accept this as an apt analogy with its corollary that caveats are available, in appropriate cases, for the interim protection of rights to title to land or registrable interest in land that are alleged by the caveator but not yet proved. Nevertheless their Lordships would point out that the issue of a caveat differs from the grant of an interlocutory injunction in that it is issued *ex parte* by the Registrar acting in an administrative capacity without the intervention of the court and is wholly unsupported by any evidence at all. Unless there were some speedy procedure open to the registered proprietor to get the caveat set aside in cases where the caveator's claim is baseless or frivolous or vexatious, the Torrens system of land registration and conveyancing, so far from giving certainty to title to land in Malaya, would leave the registered proprietor in a more precarious position as respects his powers of disposition of his land than an unregistered proprietor under English law.

Under the National Land Code there are alternative procedures for the removal of a caveat at the instance of the caveatee. Under section 326 the caveatee may apply to the Registrar for its removal and the Registrar, provided he is able to serve the caveator with notice of the application (as he was not in the instant case), is required to remove the caveat from the Register at the expiry of one month from the date of such notice, unless the caveator applies successfully to the court for an extension of the period for which the caveat shall remain on the register.

As was pointed out by the Federal Court in *Nanyang Development (1966) Sdn. Bhd.* v. *How Swee*

Poh,[1] it is the caveator who is the applicant in proceedings brought under section 326(2), and it is for him to begin and to satisfy the court that there are sufficient grounds in fact and law for continuing the caveat in force after the month has elapsed. This in their Lordships' view is plainly right. What constitute sufficient grounds they will discuss later after examining the alternative procedure open to the caveatee under section 327.

Whereas the procedure under section 326 for obtaining the removal of a caveat is available only to the caveatee, the procedure for applying directly to the court for an order of removal is available not only to the caveatee but also to any other person aggrieved by the existence of the caveat — typically a purchaser to whom the registered proprietor has contracted to sell the land but the sale has not yet been completed by a proper instrument of transfer duly registered. In their Lordships' view a distinction must be drawn between cases where the applicant is the registered proprietor of the land (i.e. the caveatee) and cases where the applicant is some other person who claims a right to an interest in it. In the former case the caveatee can rely upon his registered title as *prima facie* evidence of his unfettered right to deal with the land as he pleases; it is for the caveator to satisfy the court that there are sufficient grounds in fact and law for continuing in force a caveat which prevents him from doing so. So where, as in the instant case, the only parties to an application under section 327 are caveatee and caveator there is no difference between what the caveator must establish to obtain an extension of the caveat under section 326 and what he must establish to defeat the caveatee's application for removal of the caveat under section 327.

It is otherwise when the applicant under section 327 is someone other than the caveatee. He has no registered title to rely upon as *prima facie* evidence of his interest in the land. It is for him to begin by satisfying the court that there are sufficient grounds in fact and law for treating him as a person claiming such an interest in the land as would, if it were established, make him aggrieved by the existence of the caveat.

So far their Lordships have deliberately refrained from speaking of "onus of proof". It is an expression which, if it is used in relation to proceedings which are interlocutory in their legal character, is liable to lead to confusion. Their Lordships have already noted the analogy between the effect of a caveat and that of an interlocutory injunction obtained by the plaintiff in an action for specific performance of a contract for the sale of land restraining the vendor in whom the legal title is vested from entering into any disposition of the land pending the trial of the action. The court's power to grant an interlocutory injunction in such an action is discretionary. It may be granted in all cases in which it appears to the court to be just and convenient to do so. Similarly in section 327 it is provided that "the court ... may make such order on the application as it may think just". The guiding principle in granting an interlocutory injunction is the balance of convenience; there is no requirement that before an interlocutory injunction is granted the plaintiff should satisfy the court that there is a "probability", a "*prima facie* case" or a "strong *prima facie* case" that if the action goes to trial he will succeed; but before any question of balance of convenience can arise the party seeking the injunction must satisfy the court that his claim is neither frivolous nor vexatious; in other words that the evidence before the court discloses that there is a serious question to be tried. *American Cyanamid* v. *Ethicon Ltd.*[2]

This is the nature of the onus that lies upon the caveator in an application by the caveatee under section 327 for removal of a caveat: he must first satisfy the court that on the evidence presented to it his claim to an interest in the property does raise a serious question to be tried; and, having done so, he must go on to show that on the balance of convenience it would be better to maintain the *status quo* until the trial of the action, by preventing the caveatee from disposing of his land to some third party.

In so far as the *Nanyang Development* case might be understood as suggesting that in proceedings under section 326 or section 327 the caveator in order to maintain his caveat must satisfy the court that on the balance of probabilities his claim will succeed, it puts the burden on the caveator of satisfying the first requirement too high. On the other hand if *Kasivisvanathan Chettiar* v. *Pereira*[3] might be understood as suggesting that the first requirement would be satisfied by the facts that (i) the caveator had commenced proceedings against the caveatee to enforce his claim to an interest in the land, coupled with (ii) his bare assertion in an affidavit that he was entitled to that interest unsupported by any disclosure and verification upon oath of the facts upon which his claim was based, this would put the burden on the caveator too low.

In the case of a refusal by the vendor to complete a contract for the sale of land the normal remedy of the purchaser as plaintiff in an action is an order for specific performance of the contract; and in the absence of special circumstances, if it were shown that the vendor threatened to dispose of the land while the action was still pending, the balance of convenience would be in favour of granting an interlocutory injunction to prevent his doing so, provided that the plaintiff would be in a position to satisfy his undertaking as to damages if the action should fail at trial. So too in an application by the caveator under section 327 for removal of a caveat, once the caveatee has met the first requirement of satisfying the court that the claim on which his caveat is based does raise a serious question to be tried, the balance of convenience would in the normal way and in the absence of any special circumstances be in favour of leaving the caveat in existence until proceedings, brought and prosecuted timeously by the caveator. for specific performance of the contract of sale which he alleges had been tried.

This may be why in the Malaysian cases about applications under section 327 to which their Lordships have been referred there does not appear to have been any reference to balance of convenience. They are concerned with what, if anything, the caveator has to prove in order to resist the caveatee's application for removal of the caveat. In the instant case too the learned High Court judge never reached

the question of the balance of convenience. He concluded that the statements in the caveator's affidavit about the contract for the sale of the land which he claimed to be still subsisting were so vague, equivocal and inconsistent with the contemporary documents as to lack credibility and that they did not satisfy him that there was any serious question to be tried.

Their Lordships must therefore turn to the evidence that was before the High Court on the hearing of the application, bearing in mind that if there appears to be any conflict of evidence which is not on the face of it implausible, such a conflict ought not to be disposed of on affidavit evidence only. It leaves a serious question to be tried.

The land that is in question in the instant case had been the subject of a formal written contract of sale between the caveatees as vendors and the caveator as purchaser, drawn up by their respective solicitors and dated June 28, 1974 ("the Sale Agreement"). The price was $827,656 and this was payable as $97,765 by way of deposit and part payment of the purchase price on the execution of the agreement (Clause 1); as to a further $30.000 in part payment of the purchase price on July 29, 1974 (Clause 2); and, as to the balance of $699,890 on September 28, 1974 (Clause 3). It was expressly provided that time was to be of the essence of each of the clauses providing for such payments and that in default of punctual payment of the balance due under Clause 3 the previous payments under Clauses 1 and 2 were to be forfeited. The caveator duly paid, or was credited in account with, the deposit and paid the instalment of the purchase price due on July 29, 1974: but he defaulted on the payment of the balance of $699,890 due on September 28, 1974. On September 30 the caveatees gave notice to the caveator and his solicitors terminating the contract for breach by the caveator of the condition in Clause 3 and claiming to forfeit the deposit and instalments of the purchase price which had been already paid under Clauses 1 and 2 and totalled $127,765.

These were the facts deposed to in the joint affidavit of the caveatees filed in support of their application of August 26, 1975 for an order for removal of the caveat. Copies of the Sale Agreement and the letters terminating it were exhibited. So was a copy of a letter from the caveator's to the caveatees' solicitors dated October 25, 1974 in which among other things it was said:

"Our client states that he and your clients have orally agreed for an extension of two months beyond the 28 day of September 1974 for the completion of the purchase.

....

Our said client states that he would complete the purchase on or before the agreed extended date of 28 November, 1974."

The caveatees in their affidavit denied that any such agreement for an extension of time for payment had been reached; they also averred that the caveator had not made any attempt to complete the purchase at any time.

As appears from the recitals to the Sale Agreement, this was not the first agreement between the parties for sale of that particular area of land. There had been a former agreement dated December 16, 1973 of which a copy is exhibited to the caveator's affidavit of November 4, 1975. That former agreement was in substantially the same terms as the Sale Agreement save that the total purchase price was $777,656, the deposit and first instalment of the purchase price payable on execution of the former agreement was $20,000, the next instalment was payable on January 16, 1974 and amounted to $57,765, while the balance of $699,890 was payable on June 16, 1974. Time was made the essence of all the clauses relating to payment and in default of punctual payment of the balance there was provision for forfeiture of the instalments already paid.

As appears from his own affidavit the caveator did default in payment on June 16, 1974 of the balance of the purchase price under the former agreement. He sought from the caveatees an extension of three months in which to find the $699,890; but this was refused and the caveatees claimed to exercise their right to forfeit the instalments of $77,765 which had already been paid. The matter was compromised by the parties entering into the Sale Agreement on June 28, 1974. Instead of being forfeited, the sum of $77,765 was credited to the initial deposit of $97,765 under Clause 1 of the new agreement, the price of the land was increased by $50,000, and the date for payment of the balance of the new purchase price was September 28, 1974, a little more than three months later than under the former agreement. The former agreement was referred to in the recitals to the Sale Agreement. It was there stated that the vendors and the purchaser had mutually agreed to terminate it.

The affidavit of the caveator bears several indicia of "swearing by the book". For instance, it starts off by referring to the former agreement of December 16, 1973, of which it says:

"This agreement was not specifically cancelled or withdrawn by any subsequent agreement in writing."

despite the incontrovertible fact that the mutual agreement of the parties to determine it is recited in the Sale Agreement itself. The affidavit then goes on to say that the caveator agreed to purchase the land for the purpose of developing it in association with some unidentified third party from whom he was to receive "certain payments". The principal assertion in the first part of the affidavit is that the Sale Agreement does not contain all the terms agreed between the parties but that some of them were oral; though there is no indication as to when, where or even between whom any oral agreement is alleged to have been made. The oral terms are variously expressed as "time should not be of the essence", "the [caveatees] would grant me all the time needed to arrange for the development of the property in question in association with a third party", and "the time mentioned in the [Sale] Agreement was not to be enforced at all". These alleged oral terms are in flat contradiction to the terms of the written agreement. In their Lordships' view evidence of them is inadmissible under sections 91 and 92 of the Evidence Act, 1950; but that they should have been put forward at all throws some light upon the credence to be attached to statements made by the caveator in his affidavit. It defies belief that the caveatees would have agreed to wait for the

$699,890 balance of the purchase price for an indefinite period and without bearing interest until some unspecified third party had agreed to join with the caveator in developing the property and had made to the caveator "certain payments" of an unspecified amount. It likewise strains credibility that if there had been any such oral agreement no mention of it should have been made by the caveator's solicitors when the caveatees claimed to terminate the Sale Agreement on September 30, 1974.

The learned judge was, in their Lordships' view, justified in rejecting the allegations in this part of the caveator's affidavit as insufficient to disclose that there was any serious question to be tried as to whether any agreement for the sale of the land by the caveatees to the caveator was still subsisting at the date of the hearing of the application.

The next matter relied upon in the caveator's affidavit is that to the knowledge of the parties the land could not be developed until an access road had been constructed across some adjoining State land. In January 1974, during the currency of the former agreement, the caveatees, pursuant to its terms, had cooperated in applying for permission to construct the approach road under section 390 of the National Land Code. According to his affidavit the caveator at some date that he does not specify embarked on the construction of the road but did not complete it until May 1975. He alleges that the caveatees actively encouraged him to spend money on the road but does not state that any such encouragement was given to him to do so after he had defaulted on the payment due on September 28, 1974, when the contract was terminated by the caveatees. He contends that because by building the approach road he has enhanced the value of the caveatees' land they are estopped from denying his interest in it. Their Lordships can see no legal basis here on which to found an estoppel. The learned judge did not refer to it in his judgment and although the point was mentioned in the caveator's Memorandum of Appeal to the Federal Court it was, very sensibly, abandoned at the hearing of the appeal.

The caveator's affidavit also contains oblique and scattered references to an alleged agreement to extend for two months until November 28, 1974 the date for payment of the balance of the purchase price. It is first referred to in a subordinate clause in which it is said that the caveatees purported to terminate the agreement "notwithstanding that they had agreed to grant what has been described as an 'extension of time' for a period of two months from September 28, 1974". There is nothing to indicate how, when, where and between whom the agreement was made or what were its terms and what was the consideration for it. The omission of any of these particulars was despite the fact that in their affidavit to which the caveator was replying the caveatees had sworn that they had never entered into such an agreement. Later there is a reference to the caveatees "having first agreed and later refused an extension" but without specifying what is the refusal that is relied on; and finally it is said that it was "the refusal for an extension' [that] was unreasonable and unlawful bearing in mind all the circumstances of the case". The suggestion that there was any such agreement is inconsistent with the caveator's earlier assertions in the affidavit that it had been agreed from the outset that the date of payment was to be deferred until the "third party" had provided the caveator with the necessary funds; while if one turns to the contemporaneous correspondence it is difficult to reconcile it with the existence before September 28, 1974 for any agreement to extend the time for payment. On October 14, 1974 the caveator's solicitors returned to the caveatees' solicitors the issue document of title to the land — an action quite inconsistent with the time for completion not having expired by then. It was not until after this, on October 25, 1974, that any reference was made to any agreement for an extension of time for payment. That reference was in terms consistent with an agreement giving the caveator another two months to find the money having been reached after the notice of termination had been received. Furthermore the caveator never attempted to comply with its provisions by tendering the balance of the purchase price on or before November 28, 1974 or at all.

In the face of these vague, self-contradictory and implausible assertions on the part of the caveator, the learned judge accepted the sworn denial of the caveatees that they had ever agreed to any extension of the time of payment beyond September 28, 1974. Although in the normal way it is not appropriate for a judge to attempt to resolve conflicts of evidence on affidavit, this does not mean that he is bound to accept uncritically, as raising a dispute of fact which calls for further investigation, every statement on an affidavit however equivocal, lacking in precision, inconsistent with undisputed contemporary documents or other statements by the same deponent, or inherently improbable in itself it may be. In making such order on the application as he "may think just" the judge is vested with a discretion which he must exercise judicially. It is for him to determine in the first instance whether statements contained in affidavits that are relied upon as raising a conflict of evidence upon a relevant fact have sufficient *prima facie* plausibility to merit further investigation as to their truth. Since this is a matter upon which the opinions of individual judges may reasonably differ, an appellate court ought not to interfere with the judge's exercise of his discretion under section 327 of the National Land Code unless the way in which he exercised it is shown to have been manifestly wrong. In the instant case their Lordships see no reason for differing from the opinion of Ajaib Singh J. that the various references in the caveator's affidavit to there having been an agreement for a two months' extension of time were too implausible to throw any doubt upon the caveatees' express denial upon oath that there ever had been one.

Apart altogether from implausibility as to questions of fact their Lordships are not persuaded that an agreement of the kind alleged (so far as this can be ascertained from the references to it in the affidavit) would be capable in law of conferring upon the caveator any continuing interest in the land or estopping the caveatees from denying his interest after he had himself failed to perform it or take advantage of it by tendering the balance of the purchase price on or before November 28, 1974.

Finally it was contended on behalf of the caveator that in so far as the two sums forfeited exceeded ten per cent of the purchase price under the former agreement, viz. $77,765, they amounted to a penalty against which the court would grant relief and that the caveator was entitled to an equitable charge upon the land for the amount of the excess, *viz.* $50,000.

This contention was rejected by the learned judge; and although it was raised in the Memorandum of Appeal to the Federal Court it was abandoned by counsel for the caveator at the hearing of the appeal. So their Lordships need say no more about it, except that the removal of the caveat will not prevent the caveator, if he is so advised, from pursuing his claim that monies that the caveatees have forfeited amounted to a penalty and are recoverable.

Their Lordships therefore see no ground upon which an appellate court would be justified in interfering with the way in which Ajaib Singh J. exercised his discretion to order the removal of the caveat.

In the Federal Court the argument appears to have turned upon the circumstances in which the Sale Agreement was terminated. Time being of the essence of the provisions in the Sale Agreement for payment of the purchase price, the failure of the caveator to pay on the due date was a breach of condition which the caveatees were entitled to elect to treat as bringing the contract to an end. This they did by their letters of September 30, 1974. It would appear that the Federal Court took the view, which their Lordships have already held to be erroneous, that once the caveator had asserted in his affidavit that the Sale Agreement had not been lawfully terminated and had commenced an action for specific performance of it, the court had no option but to leave the caveat in existence until the action was tried. The Federal Court accordingly did not consider whether the learned judge's evaluation of the affidavit evidence on which he based the exercise of his discretion was manifestly wrong.

For the reasons given earlier in this opinion their Lordships consider that Ajaib Singh J.'s evaluation of the affidavit evidence was justified and that there is no ground for an appellate court to interfere with the way in which his discretion was exercised.

Their Lordships will accordingly advise His Majesty the Yang di-Pertuan Agong that this appeal should be allowed with costs here and in the Federal Court and that the order of the High Court of November 10, 1975 should be restored.

Appeal allowed.

Solicitors: *Gasters; Smiles & Co.*

SINGAPORE REPORTS

CHUA HONG HOON CO. LTD. v. GOLD COIN LTD.

[C.A. (Chua, Choor Singh & Rajah JJ.) May 25, 1979]
[Singapore — Civil Appeal No. 61 of 1978]

Torts — Negligence — Two independent tortfeasors — Damages — Fire started on one lighter and spreading to another — Damages to goods on second lighter — Common law liability of owners of both lighters — Fires (Prevention) Metropolis Act, 1774 (United Kingdom).

The first defendants and the appellants were lighterage companies. The first defendants had agreed to provide lighters for the carriage, custody and care of the respondents' goods. Pursuant to this agreement the first defendants received 1,466 bags of rice bran and 657 bags of ground cakes belonging to the respondents, which were discharged from the vessel "Kota Naga" into the first defendants' lighter bearing registration number SC6875. The said lighter was subsequently moored at Telok Ayer Basin. The appellants' lighter SC7950 which was loaded with a cargo of rubber was moored next to her. On the night of July 25, 1973, lighters SC6875 and SC7950 caught fire and the goods of the respondents in lighter SC6875 were damaged.

The learned judge found that the fire started on the appellants' lighter SC7950 and it spread to the first defendants' lighter. The first defendants' lighter was in a place where it was grounded at low tide.

The appellants appealed.

Held, dismissing the appeal: (1) the common law liability applied in this case as the fire started not on land but on a lighter of the appellants moored in a harbour. The appellants had not brought themselves within any of the defences open to them;

(2) the present case concerned two independent tortfeasors causing the same damage to the respondents. The trial judge found both defendants to blame and he rightly apportioned the liability.

Case referred to:-

(1) *Rylands* v. *Fletcher* (1868) L.R. 3 H.L. 330.

COURT OF APPEAL.

K.E. Hilborne for the appellants.

Y.H. Cheong for the respondents.

Cur. Adv. Vult.

Chua J. (delivering the judgment of the Court): This appeal arises from a claim by the respondents for damages (1) against the first defendants as bailees for reward for breach of contract and/or duty in and about the carriage and/or care and custody of the respondents' goods and (2) further or in the alternative, against the first defendants and the appellants or either one or the other of them for loss and damage caused to the respondents' goods on or about July 25, 1973, through the negligence of the first defendants and the appellants or either one or the other of them, in the handling or management of lighter bearing registration numbers SC 6875 and SC 7950 respectively.

By judgment dated September 8, 1978, judgment was given for the respondents in the sum of $46,949.41 with interest from September 21, 1974, to date at 8% and interest thereafter at 8% also till date of payment and costs against the first defendants and the appellants equally. The appellants now appeal against that judgment. The first defendants have not appealed.

The short facts are these. Both the first defendants and the appellants are lighterage companies. By